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Part 1

SEARCHING FOR AND CUTTING REGULATIONS THAT ARE UNNECESSARILY BURDENSOME ACT OF 2014

DECEMBER 12, 2014.—Ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4874]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4874) to provide for the establishment of a process for the review of rules and sets of rules, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

Purpose and Summary

H.R. 4874, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014" (SCRUB Act) establishes a blue-ribbon Retrospective Regulatory Review Commission to identify and recommend to Congress for repeal existing Federal regulations that can be eliminated to reduce unnecessary regulatory costs to the U.S. economy. The Commission is charged to reduce these costs without significantly reducing overall regulatory effectiveness, by, for example, identifying and recommending for repeal regulations that have achieved their goals and can be repealed without their target problems recurring; are obsolete or ineffective; overlap, duplicate or conflict with other Federal regulations or state and local regulations; or, impose costs that are not justified by the benefits they produce for society within the United States.

Background and Need for the Legislation

I. JOBS, GROWTH AND THE IMPACT OF FEDERAL REGULATIONS

Since the official end of the recent recession was declared in 2009, numerous observers have attributed the economy's continuing slow rates of job creation and growth in part to the burden of Federal regulation and uncertainty over what regulation will come next.[1] According to some estimates, the total annual Federal regulatory burden has reached $1.75–$1.86 trillion, or in the neighborhood of $15,000 per year for each U.S. household.[2] Americans for Tax Reform estimated in August 2011 that Americans worked an estimated 77 days per year just to cover the cost of the Federal regulatory burden.[3] According to recent Gallup survey results, small-business owners in the United States continue to list government regulation as one of the top challenges they confront.[4]

Executive orders since the 1980's have required regulatory agencies to identify clearly the problems their regulations are intended to solve, available regulatory alternatives (including the alternative of not regulating), and the costs and benefits of new regulations. Notwithstanding that, however, many Federal regulations currently in effect have been ill-considered and not clearly necessary. For example, the Obama administration has regularly failed to analyze both the costs and the benefits of substantial numbers of major regulations.[5,6] Similarly, in a multi-year study of major regu-

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[1] *See, e.g.,* Editors, *The Uncertainty Principle,* The Wall Street Journal (July 14, 2010) (available at http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html?KEYWORDS=rulemakings); John B. Taylor, *"John Taylor: Rules for America's Road to Recovery,"* The Wall Street Journal (May 31, 2012) (available at http://online.wsj.com/article/SB10001424052702303674004577434774238817962.html).

[2] *See* Clyde Wayne Crews, Jr., *Ten Thousand Commandments 2014, An Annual Snapshot of the Regulatory State,* at 2 (April 2014) (available at http://cei.org/studies/ten-thousand-commandments-2014); Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, SMALL BUSINESS ADMINISTRATION, 6 & 48 (Sept. 2010) (*available at* http://www.sba.gov/sites/default/files/rs371tot.pdf).

[3] Americans for Tax Reform, *2011 Cost of Government Day, August 12* (Aug. 10, 2011), (available at http://www.atr.org/?content=2011COGD).

[4] Gallup Economy, *Small Businesses Face Operational, Regulatory Challenges* (Feb. 28, 2014) (available at http://www.gallup.com/poll/167660/small-businesses-face-operational-regulatory-challenges.aspx).

[5] "Major" regulations generally are those with $100 million or more in effects. *See, e.g.,* Executive Order 12866 at sec. 3(f) (Sept. 30, 1993).

[6] *See* Office of Information and Regulatory Affairs, *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 3 (2010) (available at http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf); Office of Information and Regulatory Affairs, *2011 Report to*

lations, the Mercatus Center found that agencies did a poor job satisfying a host of basic rulemaking quality standards. These included the identification of clear problems requiring regulatory solutions, analysis of adequate alternatives, assessment of costs and benefits, and demonstration that chosen regulations would produce the agencies' desired outcomes.[7] Consistent with these results, there is bipartisan agreement that too many regulations currently in force are defective, and that many of these regulations can be revisited and eliminated or improved.[8]

II. RETROSPECTIVE REVIEW EFFORTS BY THE EXECUTIVE BRANCH

The Obama administration has issued three executive orders that in whole or in part call for retrospective review of existing regulations. First and foremost is Executive Order 13563, issued on January 18, 2011. Among other things, that order calls upon executive agencies to conduct, under the oversight of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), a retrospective review of existing, significant regulations to identify which "may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with" the findings of the retrospective review.[9] The order further calls for such review to be conducted periodically thereafter, so that agencies regularly can "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."[10]

Seven months later, on July 7, 2011, President Obama issued another executive order, E.O. 13579, directed at independent agencies, such as the Federal Communications Commission, the Federal Reserve Board and the Securities Exchange Commission. These agencies fell outside the requirements of E.O. 13563 and prior orders, such as E.O. 12866, due in part to hesitancy by presidents to assert direct White House control over independent agencies' regulatory decisions. In E.O. 13579, the President exhorted independent agencies, like the executive agencies addressed by E.O. 13563, to conduct retrospective analyses of existing significant regulations and to prepare plans under which independent agencies would

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Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities at 3 (2011) (available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf); Office of Information and Regulatory Affairs, *2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 3–4 (2012) (available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf); Office of Information and Regulatory Affairs, *2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 4 (2014) (available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf).

[7] *See generally* Mercatus Center, *Regulatory Report Card,* available at: http://mercatus.org/reportcard. For a description of the Report Card's methodology, *see* http://mercatus.org/reportcards/methodology.

[8] *See, e.g.,* Executive Order 13563, *Improving Regulation and Regulatory Review,* at sec. 6, 76 Fed. Reg. 3821, 3822 (Jan. 18, 2011) (agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned); Pres. Barack Obama, *Toward a 21st Century Regulatory System,* The Wall Street Journal (January 18, 2011) (E.O. 13563 "orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive") (available at http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html).

[9] 76 Fed. Reg. at 3822.

[10] *Id.*

thereafter periodically conduct similar retrospective reviews to determine whether any such regulations should be modified, streamlined, expanded, or repealed.[11] Unlike executive agencies, independent agencies were not ordered to submit such plans to OIRA, but rather simply to release the plans to the public.[12]

Finally, on May 10, 2012, the President released Executive Order 13610, "Identifying and Reducing Regulatory Burdens." This order "invites public participation to help agencies determine whether existing regulations remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies."[13] It also "instructs agencies to give priority to initiatives that will produce significant monetary savings or reductions in paperwork burdens while protecting public health, welfare, safety, and the environment."[14] Finally, the order "[r]equires agencies to regularly report to OIRA on retrospective review efforts, including their progress, anticipated accomplishments, and proposed timelines for relevant actions."[15] The first of these reports was due on September 10, 2012. Reports were due thereafter on the second Monday of January and July of each year.

Notwithstanding their goals in concept, these executive orders have from the outset produced few meaningful results in practice. For example, the Heritage Foundation's July 25, 2011, mid-year report on growth in Federal regulation reported that, notwithstanding the issuance of E.O. 13563, '[i]n the first 6 months of the 2011 fiscal year . . . [n]o major rulemaking actions were taken to reduce regulatory burdens during this period." From January 2009 to mid-FY 2011, "there were only six major deregulatory actions . . . , with reported savings of just $1.5 billion."[16] The Administration's own preliminary results of the E.O. 13563 review, released in May 2011, suggested that the Administration had identified only about $1 billion a year in potential regulatory burden reductions from the repeal or modification of existing regulations.[17] More recently, in a January 2014 assessment of the Administration's retrospective review effort, the American Action Forum (AAF) determined that "[o]n net, proposed and final rules that have come under this reform have *added* $13.7 billion in new burdens," although "counting only regulations that cut costs, the Administration has cut at least $8.7 billion in burdens."[18]

In and of itself, a reduction of $8.7 billion in regulatory costs, if it actually occurred, would be a positive development. However, if the net result of activity under the Administration's regulatory reform initiative has been the *addition* of $13.7 billion in regulatory burdens, then it appears that the Administration's effort has failed. Making matters worse, regulatory activity under the current Administration outside of the retrospective review initiative has

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[11] *Id.*
[12] *Id.*
[13] 77 Fed. Reg. 28,469 (May 14, 2012).
[14] *Id.* at 28,470.
[15] *Id.*
[16] James Gattuso and Diane Katz, *Red Tape Rising: A 2011 Mid-Year Report,* the Heritage Foundation (July 25, 2011*) ("Red Tape Rising Mid-Year Report")* (available at http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report).
[17] *Red Tape Rising Mid-Year Report.*
[18] Sam Batkins, *Three Years of Regulatory Reform: Did the President's Executive Orders Work?,* American Action Forum (Jan. 21, 2014) (emphasis added) (available at http://americanactionforum.org/insights/three-years-of-regulatory-reform-did-the-presidents-executive-orders-work).

dwarfed any results of the Administration's retrospective review. According to AAF, between 2010 and early 2014, the total burden of paperwork hours imposed by Federal regulation increased by 1.5 billion hours, or 17 percent, and the Obama administration added $488 billion in new regulatory costs between 2009 and 2012.[19] The Heritage Foundation has estimated that new regulatory costs just from major regulations totaled roughly $70 billion during the Administration's first term.[20]

From 2003 to 2006, the George W. Bush administration also engaged in retrospective review of existing regulations. Its aim, like the Obama administration's stated goal, was to identify and modify or rescind regulations that performed suboptimally. Also like the Obama administration, the Bush administration conducted its review under OIRA's oversight and with opportunities for the public to identify problematic regulations. The Bush administration's effort, however, likewise did not produce major results.

There are a number of reasons for which retrospective review efforts to date may not have produced significant results. Regulatory agencies, on the one hand, have strong incentives to focus their resources on prospective regulatory activities that address new problems and congressional mandates. They have much weaker incentives to revisit their past work at their own instance, or even at the Executive's instances, examine that work, brand it as unnecessary, ineffective or counterproductive, and repeal or amend it. Regulated entities, meanwhile, have strong incentives to focus their resources on the shaping of new regulations and the prevention of unsound new regulations, rather than on the nomination of old regulations that agencies should modify or rescind. For example, post-hoc attempts by regulated entities at their own instance to identify old regulations for repeal or amendment can antagonize the very regulatory agencies with which these entities must deal on a regular basis.

III. RECENT LEGISLATIVE PROPOSALS AND COMMITTEE OVERSIGHT LEADING TO THE SCRUB ACT

Against this background of failure under executive orders and other initiatives, a number of proposals to require some manner of retrospective regulatory review through the stronger means of legislation have been introduced or advocated over the past several years, both within the Congress and in the broader public. These have included, among others, proposals featuring the institution of a blue-ribbon commission, akin to the Base Realignment and Closure Commission established under the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101–510, to identify and recommend to Congress regulations that should be repealed, as well as a proposal to require agencies to repeal one or more existing regulations when they promulgate new regulations.[21]

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[19] Sam Batkins, *President Obama's $488 Billion Regulatory Burden,* at 3, American Action Forum (Sept. 19, 2012) (available at http://americanactionforum.org/research/president-obamas-488-billion-regulatory-burden).

[20] James Gattuso and Diane Katz, *Red Tape Rising: Regulation in Obama's First Term,* the Heritage Foundation (May 1, 2013) (available at http://www.heritage.org/research/reports/2013/05/red-tape-rising-regulation-in-obamas-first-term).

[21] *See, e.g.,* Michael Mandel, Ph.D., *Reviving Jobs and Innovation: A Progressive Approach to Improving Regulation,* Progressive Policy Institute (Feb. 2011) (available at http:// Continued

The Subcommittee on Courts, Commercial and Administrative Law held an oversight hearing on July 12, 2012, at which it considered the need for retrospective regulatory review, assessed the Obama administration's efforts up to that time, and evaluated a number of retrospective review concepts proposed up to that point.[22] All witnesses at the hearing agreed that retrospective regulatory review was an important concept that deserved serious consideration, although they did not all agree on what approach to adopt to carry out this function.

To make the most of meritorious aspects of prior proposals, including useful concepts from President Obama's executive orders, to better align incentives, and to create the most effective overall approach, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014," or "SCRUB Act," builds several features of prior proposals and initiatives into its architecture, along with innovations of its own. In a nutshell, the SCRUB Act institutes an independent Retrospective Regulatory Review Commission with authority to identify within the Code of Federal Regulations, and with the assistance of the public, any regulations or sets of regulations that implement regulatory programs that, under specified criteria, merit repeal to reduce unnecessary regulatory cost burdens. The Commission is empowered to recommend the highest priority repeals for immediate action, and, if a joint congressional resolution of approval is enacted, agencies are required to execute these repeals within 60 days of enactment. All other regulations recommended by the Commission for repeal are placed into an inventory of regulations which the agencies must repeal over time through a "cut-go" process as agencies promulgate new regulations. Under this process, the costs of each new regulation must be offset by cost-reductions associated with the repeal of regulations in the inventory, until each agency completes the repeals of its own regulations specified in the inventory. Agencies are left free to determine the order in which they will execute inventory-based repeals. They also remain free to promulgate new regulations that re-implement statutory authority originally implemented by a regulation in the inventory. If they do so, however, they must assure that repeals of regulations in the inventory achieve a full, net offset of the costs of the new regulation. Finally, when the Commission recommends the repeal of a set of rules that implement a regulatory program, the Commission is to provide to Congress an analysis of whether Congress should consider repeal of the underlying statutory authority which the set of regulations implemented.

The Commission is given the goal of achieving at least a 15% reduction in the cumulative cost burden imposed by Federal regulation, without significantly reducing overall regulatory effectiveness. Through the institution of this goal, the provision of the tools needed to achieve it, and a better alignment of incentives to assure the use of those tools, the SCRUB Act promises to achieve real, mean-

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progressivepolicy.org/wp-content/uploads/2011/02/2011_Mandel_A-Progressive-Approach-to-Improving-Regulation.pdf); Sen. Mark Warner, *Self-Replicating Regulation: How to Trim Government* Overlap, The Atlantic (Mar. 12, 2012) (available at http://www.theatlantic.com/politics/archive/2012/03/self-replicating-regulation-how-to-trim-government-overlap/253898/).

[22] Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, *Hearing on: "Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations,"* (July 12, 2012) (hearing record available at http://judiciary.house.gov/index.cfm/hearings?ID=37A1AEB4-AFA1-6465-6E4E-0529E909296F).

ingful elimination of unnecessary regulatory costs, promoting needed job creation and economic growth.

Hearings

The Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law held 1 day of hearings on H.R. 4874, as embodied in a draft version of the legislation, on February 11, 2014. Testimony was received from Patrick A. McLaughlin, Senior Research Fellow, Mercatus Center, George Mason University; Sam Batkins, Director of Regulatory Policy, American Action Forum; and, Prof. Ronald M. Levin, Washington University School of Law, with additional material submitted by the Natural Resources Defense Council and the Coalition for Sensible Safeguards.

Committee Consideration

On June 18, 2014, the Committee met in open session and ordered the bill H.R. 4874 favorably reported without amendment, by a rollcall vote of 17 to 10, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 4874.

1. Amendment #2, offered by Mr. Johnson. The Amendment strikes title II of the bill, eliminating the bill's regulatory "cut-go" provisions. The amendment was defeated by a rollcall vote of 9 to 16.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Total	9	16	

2. Reporting H.R. 4874. The bill establishes a blue-ribbon Retrospective Regulatory Review Commission to identify and recommend to Congress for repeal existing Federal regulations that can be eliminated to reduce unnecessary regulatory costs to the U.S. economy. Reported by a rollcall vote of 17 to 10.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)	X		
Mr. Smith (TX)			
Mr. Chabot (OH)	X		
Mr. Bachus (AL)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)			
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)			
Ms. Farenthold (TX)	X		
Mr. Holding (NC)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Mr. Smith (MO)	X		
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Scott (VA)		X	
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)		X	
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Total	17	10	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

With respect to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, an estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 was not submitted to the Committee before the filing of the report.

Duplication of Federal Programs

No provision of H.R. 4874 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 4874 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4874 is designed to assure the identification and repeal of existing Federal regulations that can be eliminated to reduce unnecessary regulatory costs to the U.S. economy, without significantly reducing overall regulatory effectiveness, and with a goal of reducing by at least 15 percent the cumulative cost burden imposed by Federal regulation.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4874 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title.

Provides that the short title of the bill shall be the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014" (SCRUB Act of 2014).

Section 2. Table of Contents; Titles I–V

Title I. Retrospective Regulatory Review Commission

Sec.101. General Provisions

- Establishes a blue-ribbon, BRAC-style commission to review existing Federal regulations and identify those that should be repealed to reduce unnecessary regulatory burdens.
- Sets the Commission's goal to be the reduction of at least 15 percent in the cumulative costs of Federal regulation with a minimal reduction in the overall effectiveness of such regulation.
- Specifies classes of regulations that should be the Commission's priorities for review (specifically, rules or sets of rules that: are major rules or include major rules; have been in effect more than 15 years; impose paperwork burdens that could be reduced substantially without significantly diminishing regulatory effectiveness; impose disproportionately high costs on small businesses; or, could be strengthened in their effectiveness while reducing regulatory costs).
- Establishes additional factors for the Commission to take into account when identifying individual regulations or sets of regulations for repeal (*e.g.,* the regulations have been rendered obsolete by technological or market changes; the regulations have achieved their goals and can be repealed without target problems recurring; the regulations are ineffective; the regulations overlap, duplicate or conflict with other Federal regulations or, where feasible, with state and local

regulations; or, the regulations' costs are not justified by the benefits they produce for society within the United States).

- Authorizes the Commission to classify identified regulations for either: (1) immediate repeal; or, (2) repeal through regulatory "cut-go" procedures as agencies promulgate new rules. All such must be made by the relevant agencies if a joint resolution of Congress is enacted to approve the Commission's recommendations.
- Requires the Commission to hold public meetings and publish annual and final reports; authorizes the Commission to hold hearings; provides the Commission with authority to obtain necessary documents and witnesses.
- Authorizes funding of the Commission from the unobligated funds of regulatory agencies within the Commission's purview.

Title II. Regulatory Cut-Go

Sec. 201. Cut-Go Procedures

- Requires agencies, when they promulgate new regulations, to offset the new regulations' costs fully by repealing regulations identified by the Commission for repeal other than on an immediate basis.
- Allows agencies alternatively to repeal Commission-identified regulations on an earlier basis to create cost-reduction credits, and later apply the credits to offset the costs of new regulation.

Sec. 202. Applicability

- Lifts the Act's cut-go requirements once agencies achieve, by repeal of Commission-identified regulations, all cost reductions the Commission determined could be achieved.

Sec. 203. OIRA Certification of Cost Calculations

- Requires the Office of Information and Regulatory Affairs to review and certify the accuracy of agencies' estimates of the costs of new regulations, include the certifications in the administrative records of new regulations, and transmit copies of the certifications to Congress.

Title III. Retrospective Review of New Rules

Sec. 301. Plan for Future Review

- Requires agencies, when they promulgate new regulations, to publish plans for the review of those regulations. Such reviews are to take place no later than 10 years after promulgation.
- Requires agency reviews of major regulations (e.g., regulations that impose costs of $100 million or more) to be substantially similar to Commission-conducted reviews.
- Requires agencies, when feasible, to include proposed plans for review in their notices of proposed rulemaking for new regulations.

Title IV. Judicial Review

Sec. 401. Judicial Review

- Subjects to judicial review under the Administrative Procedure Act agency compliance with section 101(j)(1) (immediate repeals), title II of the Act (cut-go repeals) and section 301 (retrospective review plans).

Title V. Miscellaneous Provisions

Sec. 501. Definitions

- Sets forth definitions of terms in the Act.

Sec. 502. Effective Date

- Provides that the Act and amendments made by the Act shall take effect beginning on the date of enactment.

Dissenting Views

INTRODUCTION

H.R. 4874, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2014," would establish a "Retrospective Regulatory Review Commission" charged with assessing the economic costs of all agency rules, informal interpretive rules, general statements of policy, rules of agency organization and procedure, informal guidance documents, and memoranda. The Commission's assessment would prioritize corporate profits over public health and safety, ignoring the many benefits and protections that agency rules provide. To finance this review of all rules, informal documents, and interpretative rules, H.R. 4874 would siphon billions of dollars from agency budgets, diverting these much-needed funds into an unnecessary bureaucratic accounting project.

Further yet, title II of the bill would establish a regulatory "cut-go" process that would operate as a one-way ratchet, forcing agencies to prioritize between existing protections and responding to new threats to our health and safety. Regulatory cut-go would prohibit *any* regulatory agency from issuing *any* new rule or informal statement, even in the case of an emergency or imminent harm to public health, until the agency first offsets the costs of that new rule or guidance by repealing an existing rule specified by the Commission. This requirement would place public health and safety at risk as well as unnecessarily delay Federal rulemaking by years and waste untold taxpayer dollars and agency resources.

The SCRUB Act is a dangerous solution in search of a problem. Each branch of government already conducts effective oversight through retrospective review of agency rules, narrowing the delegations of authority to agencies, controlling agency appropriations, and conducting oversight of agency activity. Congress also has the specific authority under the Congressional Review Act to disapprove any rule that an agency proposes.[1] Overlooking this array of options that would provide the necessary scalpel for smart regulatory cuts, the SCRUB Act's meat-cleaver approach is yet another dangerous and unbalanced attempt to derail agencies' missions to protect the public health and safety. Rather than creating jobs,

[1] 5 U.S.C. § 801(b) (2014).

growing the economy, or making Americans safer, these dangerous procedures would tie agencies' hands with unnecessary red-tape and waste valuable agency resources and taxpayer dollars.

In recognition of these concerns, the Coalition for Sensible Safeguards—an alliance of more than 70 consumer, labor, research, faith, and other public interest groups—strongly opposes this legislation, stating that it would likely lead to the repeal of "critical health, safety, and environmental safeguards, even when the benefits of these rules outweigh the costs."[2] In addition, the Center for Effective Government, a government accountability public-interest group, states that the "clear agenda behind this legislation is to limit the role of congressionally established agencies tasked with protecting public health and safety by establishing a new commission and tasking it with getting rid of or weakening any rules that big businesses dislike."[3]

For the foregoing reasons, and those discussed more fully below, we respectfully dissent and urge opposition to H.R. 4874.

DESCRIPTION

A brief summary of H.R. 4874's provisions within the Committee's jurisdiction is presented here and a more detailed section-by-section explanation of the bill appears at the end of these views.

Although Title I of H.R. 4874 is not within the jurisdiction of our Committee, an explanation of this provision is necessary to place the remainder of the bill in proper perspective. Section 101 establishes a Retrospective Regulatory Review Commission to review rules to determine whether they should be repealed to eliminate or reduce the costs of regulation to the economy. The Commission would be composed of nine members appointed by the President and confirmed by the Senate. The Commission would be funded

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[2] COALITION FOR SENSIBLE SAFEGUARDS, "The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014," at 1–2 (June 17. 2014) (on file with the H. Committee on the Judiciary Democratic staff). Current members of the Coalition include: AFL-CIO; Alliance for Justice; American Association of University Professors; American Federation of State, County and Municipal Employees; American Federation of Teachers Americans for Financial Reform; American Lung Association; American Rivers; American Values Campaign; American Sustainable Business Council; BlueGreen Alliance; Campaign for Contract Agriculture Reform; Center for Effective Government; Center for Digital Democracy; Center for Food Safety; Center for Foodborne Illness Research & Prevention; Center for Independent Living; Center for Science in the Public Interest; Citizens for Sludge-Free Land; Clean Air Watch; Clean Water Network; Consortium for Citizens with Disabilities; Consumer Federation of America; Consumers Union; CounterCorp; Cumberland Countians for Peace & Justice; Demos; Economic Policy Institute; Edmonds Institute; Environment America; Farmworker Justice; Free Press; Friends of the Earth; Green for All; Health Care for America Now; In the Public Interest; International Brotherhood of Teamsters; International Center for Technology Assessment; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); League of Conservation Voters; Los Angeles Alliance for a New Economy; Main Street Alliance; National Association of Consumer Advocates; National Center for Healthy Housing; National Consumers League; National Council for Occupational Safety and Health; National Employment Law Project; National Lawyers Guild, Louisville Chapter; National Women's Health Network; National Women's Law Center; Natural Resources Defense Council; Network for Environmental & Economic Responsibility of United Church of Christ; New Jersey Work Environment Council; New York Committee for Occupational Safety and Health; Oregon PeaceWorks; People for the American Way; Protect All Children's Environment; Public Citizen; Reproductive Health Technologies Project; Safe Tables Our Priority; Sierra Club; Service Employees International Union; Southern Illinois Committee for Occupational Safety and Health; The Arc of the United States; The Partnership for Working Families; Trust for America's Health; U.S. Chamber Watch; U.S. PIRG; Union of Concerned Scientists; Union Plus; United Food and Commercial Workers Union; United Steelworkers; Waterkeeper Alliance; and Worksafe. COALITION FOR SENSIBLE SAFEGUARDS—OUR MEMBERS, http://sensiblesafeguards.org/our-members.

[3] Katie Weatherford, *The SCRUB Act: Another Anti-Regulatory Bill Targets Health, Safety, and Environmental Protections,* Center for Effective Government (Feb. 18, 2014), http://www.foreffectivegov.org/blog/scrub-act-another-anti-regulatory-bill-targets-health-safety-and-environmental-protections.

through the greater of $25 million or 1% of all unobligated funds for each Federal agency that makes rules.

Title I of the SCRUB Act would empower the Commission to conduct its review of all formal and informal rules through its own methodology, which must be published in the Federal Register and on the Commission's website. Although the bill would require that the Commission prioritize major rules in its review, this review would also include any rules that have been in effect for over 15 years, impose paperwork burdens, or impose disproportionately high costs on small businesses, or could be strengthened in their effectiveness while reducing regulatory costs.

The breadth and scope of the mandated review would encompass not only the entire Code of Federal Regulations, but also all informal rules and documents as well. This review would include any "rule" defined in section 551 of the Administrative Procedure Act,[4] which applies to the entirety of the APA, as well as all agency interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice that would otherwise be exempt from the APA's notice-and-comment requirements.[5] The Commission must set a goal of reducing 15% of the cumulative cost of Federal regulation with a minimal reduction in the overall effectiveness of such regulation.

Title II of H.R. 4874 would establish a regulatory "cut-go" process. This process would require agencies to offset the cost of any new rule by eliminating a rule identified by the Commission. Alternatively, an agency may elect to repeal rules identified by the Commission in anticipation of promulgating a new rule, so long as it results in a net reduction in costs imposed by the agency's new rule. Once an agency has repealed all the rules identified by the Commission, that agency is no longer subject to regulatory cut-go.

The SCRUB Act would create two oversight mechanisms for the regulatory cut-go process. First, agency compliance with the SCRUB Act's cut-go process is subject to judicial review under Title IV of the bill. Second, section 203 would require the Administrator of the Office of Information and Regulatory Administration (OIRA) to oversee each agency's calculations of costs associated with new rules. OIRA would be required to review and certify the costs of each new rule and informal publications such as guidance documents and memoranda. Section 203 would further require agencies to include this review in the administrative record of each rulemaking.

BACKGROUND

Federal regulations impact nearly every aspect of our lives and are "one of the basic tools of government used to implement public policy."[6] The Congressional Research Service observes:

> Agencies issue thousands of rules and regulations each year to implement statutes enacted by Congress. The pub-

[4] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2014). The APA defines a "rule," as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2014).

[5] 5 U.S.C. § 553(b)(3)(A).

[6] CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2005).

> lic policy goals and benefits of regulations include, among other things, ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water and land are not polluted; and that the appropriate amount of taxes is collected. The costs of these regulations are estimated to be in the hundreds of billions of dollars, and the benefits estimates are even higher.[7]

The Administrative Procedure Act (APA),[8] enacted in 1946, establishes the minimum rulemaking and formal adjudication requirements for all administrative agencies.[9] The APA's baseline procedural requirements are designed to maintain a balance between this type of agency flexibility and the requirements of due process. As more than 50 leading administrative law academics have observed, "The APA has served for 65 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life."[10]

In general, proposed rules go through an extensive vetting process that many believe has become already too ossified.[11] In addition to the APA, numerous other procedural and analytical requirements have been imposed on the rulemaking process by Congress and various presidents.[12] These requirements focus "predominately on agencies' development of new rules," according to the Government Accountability Office (GAO).[13]

In addition to assessing rules before they go into effect, agencies are often required to review their regulations retrospectively to determine whether any should be revoked or modified. Some reviews are conducted in response to legislative mandate, at the discretion of the agency,[14] or as required by executive order.[15]

CONCERNS WITH H.R. 4874

The SCRUB Act would establish a Commission charged with a redundant and unbalanced mandate that prioritizes economic costs of rules with little to no consideration of the benefits and protec-

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[7] *Regulatory Reform: Are Regulations Hindering Our Competitiveness?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Gov't Reform,* 109th Cong. (2005) (testimony of J. Christopher Mihm, Managing Director—Strategic Issues, U.S. Government Accountability Office).

[8] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2014).

[9] The APA defines "rulemaking" as the "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(5) (2014). A "rule," in turn, is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2014).

[10] Letter from 52 administrative law academics to H. Judiciary Comm. Chair Lamar Smith (R-TX) and H. Judiciary Comm. Ranking Member John Conyers, Jr., 1 (Oct. 24, 2011) (on file with the H. Comm. on the Judiciary, Democratic staff).

[11] *See, e.g.,* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossificiation Thesis,* 80 GEO. WASH. L. REV. 1493 (2012).

[12] Examples of legislative mandates include the Unfunded Mandates Reform Act, Pub. L. No. 104–4 (1995); the Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164, 1169 (1980); and the Congressional Review Act, Pub. L. No. 104–121 (1996). In addition, both Republican and Democratic Presidents have issued executive orders mandating additional procedural and analytical requirements for Federal rulemakings. *See, e.g.,* Exec. Ord. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993) (outlining requirements for cost-benefit analysis and review by the Office of Information and Regulatory Affairs for significant rules issued by executive branch agencies).

[13] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–07–791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 1 (2007) [hereinafter GAO REPORT].

[14] *Id.* at 5.

[15] For a more extensive discussion of statutes and executive orders requiring retrospective review, *see* discussion *infra* Part III.B.

tions these rules provide for the public safety and the health of the environment. Title II of the bill would further require that agencies off-set the cost of new rules through a regulatory "cut-go" process for every new agency rule. Relying on the faulty premise that regulations undermine economic growth and job creation, regulatory cut-go would force agencies to offset the costs of *any* new rule, informal guidance document, or memoranda by repealing an existing rule identified by the Commission. This additional layer of red-tape would require a new rulemaking process for each rule eliminated, forcing agencies to wastefully calculate the cost of any agency action, including issuing informal memoranda. The result of this misguided legislation would be years of delays in the rulemaking process, an unprecedented burden on agencies and taxpayers, and a dangerous threat to the agencies' missions to protect the public health and safety from imminent harm.

I. REGULATORY CUT-GO WOULD IMPEDE AGENCY ACTION BY IMPOSING BURDENSOME AND UNNECESSARY REQUIREMENTS ON ANY AGENCY ACTION

Title II of the SCRUB Act would prohibit any regulatory agency from issuing any new rule, including non-legislative and procedural rules, until the agency offsets the costs of the new rule by eliminating an existing rule identified by the Commission.[16] This process, also known as regulatory cut-go, would present a dangerous false choice to agencies, cause years of delays in the rulemaking process, and create additional burdens due to its implementation problems. As administrative law experts Sidney Shapiro and Richard Murphy argue, regulatory cut-go is "so fundamentally flawed that it cannot be regarded as a serious policy proposal," but instead is "a political stunt designed to appeal to the anti-regulatory reflexes of corporate interests that find regulation costly and of people who subscribe to the ideological belief that government is always the problem and never the solution."[17]

A. Regulatory Cut-Go Would Require Agencies to Estimate the Cost of Virtually Every New Action

The SCRUB Act would require agencies to calculate the costs of any new "rule," which includes practically any agency action or communication, to determine whether the rule triggers the bill's regulatory cut-go provisions.[18] The bill defines "rule" through reference to section 551 of the APA.[19] This definition is so broad that it applies to virtually any agency action, including (1) legislative rules that bind regulated entities; (2) non-legislative rules, such as general statements of policy such as a press release, speech, memorandum, statements, and informal guidance document;[20] and (3)

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[16] H.R. 4874, 113th Cong. 201 (2014).

[17] Sidney A. Shapiro *et al.*, Regulatory, *'Pay Go': Rationing the Public Interest,* CTR. FOR PROGRESSIVE REFORM ISSUE ALERT #1214 1 (Oct. 2012), http://progressivereform.org/articles/Regulatory_Pay-Go_1214.pdf [hereinafter Shapiro].

[18] H.R. 4874, 113th Cong. 203 (2014) ("The Administrator of the Office of Information and Regulatory Affairs of the Office of Managment [sic] and Budget shall review and certify the accuracy of agency determinations of the costs of new rules under section 201.")

[19] 5 U.S.C. § 551 (2014).

[20] 5 U.S.C. § 553(b)(3)(A); William Funk, A Primer on Nonlegislative Rules, 53 Admin. L. Rev. 1321, 1322 (2001)("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties.").

rules of agency organization, procedure and practice, which courts have defined as technical regulations to prescribe order and formality in business transactions.[21] The effect of this limitless classification of agency action would be to discourage agencies from clarifying and updating rules, leading to the inconsistent application of rules by agency personnel.

The SCRUB Act is silent on how agencies would calculate the costs of every new rule. Far from an exact science, costs are notoriously difficult for agencies to calculate.[22] The Office of Management and Budget (OMB) observed in its first annual report on the costs and benefits of Federal regulations that there are "enormous data gaps in the information available on regulatory benefits and costs."[23] If tasked with determining the costs of each regulatory action, agencies would likely rely on industry-supplied data, which routinely overstates the costs of rules.[24] In a review of several dozen environmental and occupational safety regulations, researchers repeatedly found that "cost estimates tend to be much higher than real-world compliance costs."[25] This is particularly true for the initial estimates of rules' costs, which were "at least double" their actual cost, and "could be seen more in the nature of debating points than objective cost assessments of costs."[26]

The SCRUB Act's cost-assessment requirement would also deter agencies from proactively clarifying matters of law or policy through non-legislative and procedural rules. Agency personnel routinely rely on non-legislative rules to inform the public and to maintain the consistent applications of statutes and regulations within agencies.[27] These rules are routine and serve a variety of critical functions, such as assuring the uniform application of a statute or regulation and informing the public of an agency's practice and views.[28] For instance, David Cohen, the Under Secretary for Terrorism and Financial Intelligence at the U.S. Department of the Treasury, delivered remarks earlier this year to clarify the finance risks involved with virtual currency such as Bitcoin, which is an emerging topic in the field.[29] These remarks, which described prior enforcement actions by the agency and agency guidance in the area of virtual currency, would not be considered a "meeting" within the meaning of section 553 of the APA.[30] However, these remarks would still be within the SCRUB Act's definition of a rule, thereby triggering the SCRUB Act's cost-assessment requirement. In another example, the Food and Drug Administration (FDA) regularly issues informal guidance on routine matters to inform the

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[21] Pickus v. United States Board of Parole, 507 F.2d 1107, 1113–14 (D.C. Cir. 1974).

[22] Shapiro, *supra* note 17, at 8.

[23] OFFICE OF MANAGEMENT AND BUDGET, 1998 *Report of OMB to Congress on the Costs and Benefits of Federal Regulations* 2 (1998).

[24] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation,* 80 TEX. L. REV. 1997, 2011, 2042 (2002)

[25] *Id.*

[26] *Id.*

[27] Sam Kalen, *Guidance Documents and the Courts, in* 57 ROCKY MOUNTAIN MINERAL LAW INSTITUTE PROCEEDINGS OF THE ROCKY MOUNTAIN MINERAL LAW FIFTY-SEVENTH ANNUAL INSTITUTE 5–1 (ROCKY MOUNTAIN MINERAL LAW FOUNDATION ed., 2011).

[28] *Id.*

[29] David S. Cohen, *Remarks From Under Secretary of Terrorism and Financial Intelligence David S. Cohen on "Addressing the Illicit Finance Risks of Virtual Currency,* DEPARTMENT OF THE TREASURY (Mar. 18, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl236.aspx.

[30] 5 U.S.C. 553(b) (defining "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.").

public of its practices, such as its recent guidance on the FDA's voting procedures for advisory committee meetings.[31] The FDA also issues guidance to ensure the uniform application of statutes, such as when it recently issued informal guidance on the quality requirements of baby formula,[32] as well as the nutritional labeling for foods that are gluten-free or contain allergens.[33] Again, because the SCRUB Act's cost-estimate requirement does not distinguish between routine guidance and major rules, it is unclear whether agencies would continue to perform this function if each action triggered procedural hurdles under the SCRUB Act. This reverse incentive to avoid offering clarification or additional guidance would result in the inconsistent application of regulation and statutes by agency personnel. Without routine informal guidance, agency personnel lack a consistent mechanism for applying rules and statutes.

Worse still, the bill would discourage agencies from clarifying rules, notifying the public of shifting views on existing rules, or updating previous guidance documents to include the latest science on important issues affecting the public health, such as the FDA has with baby formula guidance documents.[34] The SCRUB Act would also have a chilling effect on speech by agency officials, who would think twice before delivering statements or issuing press releases to inform the public of agency views or activity, shrouding these practices and views from the public. Regardless of the result, the practical effects of this over-broad requirement would be to diminish agencies' ability to protect and inform the public through clarifications and updates of non-legislative and procedural rules.

In addition to tasking agencies with calculating the costs of any new rule, Section 203 of the SCRUB Act would further require that OIRA certify the accuracy of these estimates. Currently, OIRA only reviews a small portion of "significant" proposed rules,[35] allowing it to efficiently allocate its finite resources to review the most pressing rules. By substantially expanding OIRA's mandate to include every regulatory action, the SCRUB Act would water-down OIRA's oversight of the rulemaking process. Additionally, requiring OIRA to review every new rule would facilitate greater political interference in the rulemaking process by giving the executive branch more control over congressionally-mandated rulemaking. In short, greater presidential control over rulemaking, in the wrong administration's hands, could undermine important health, safety, consumer protection, financial and other regulations by providing industry with an additional bottleneck for the issuance of rules. As a detailed analysis of the Bush administration's involvement of the rulemaking process demonstrates, overly restrictive control of the rulemaking process by the executive branch undermines the public interests and circumvents legislative intent.[36]

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[31] FOOD AND DRUG ADMINISTRATION, *Voting Procedures for Advisory Committee Meetings* (Aug. 2008), http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM125641.pdf.

[32] 21 CFR 106.96(i) ("Eligible" infant formulas)

[33] *Food Allergens Guidance Documents & Regulatory Information,* FOOD AND DRUG ADMINISTRATION, http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Allergens/default.htm (accessed on July 2, 2014).

[34] 21 CFR 106.96(i).

[35] Exec. Order 12,866, 58 Fed. Reg. 51,735, § 6(b)(1) (1993).

[36] H. Comm. on the Judiciary Majority Staff, Reining in the Imperial Presidency—Lessons and Recommendations Relating to the Presidency of George W. Bush, 111th Cong., at 186 (Mar. 2009).

B. Regulatory Cut-Go Would Require Agencies to Conduct a Costly and Time-Consuming Rulemaking Process for Each Rule Eliminated

As previously discussed, the SCRUB Act would require agencies to offset the costs of virtually all agency action. Agencies, however, are unable to simply rescind rules. Instead, the APA requires that agencies follow the same notice-and-comment procedures to eliminate a rule as would be required to issue the same rule in the first place.[37] Therefore, prior to eliminating any rule through regulatory cut-go procedures, the Supreme Court has clarified that agencies must undertake a lengthy rulemaking process to carefully "examine the relevant data and articulate a satisfactory explanation for its action,"[38] thereby forcing agencies to undertake twice as much work to issue a single new rule. Prior to promulgating a new legislative rule, agencies would have to prepare two proposals: one for promulgating a new rule, and one for eliminating an existing rule required by the Commission.[39] This process may take anywhere from a few months to several years,[40] especially when the underlying rule involves complex matters of science or economics.[41] Although Congress specifically excluded non-legislative and procedural rules from this process,[42] the SCRUB Act's broad definition of rule would circumvent this commonsense exclusion.[43] Furthermore, unless agencies are able to justify the elimination of a rule through a rational basis supported by the rulemaking record, any rescission of a rule may be vacated as "arbitrary and capricious" under section 706 of APA.[44] The SCRUB Act would essentially function as a chokehold on Federal agency rulemaking, delaying any new action by an agency and draining agency resources in a time of widespread budget austerity.[45]

C. The SCRUB Act Would Open the Floodgates to Legal Challenges to Rules Eliminated through Regulatory Cut-Go

In the event that agencies could overcome the procedural hurdles imposed by the SCRUB Act, courts would have ample opportunity to review any agency action to implement the statute, opening the floodgates of legal challenges to the SCRUB Act. Title IV of the bill subjects an agency's compliance with the bill's cut-go procedures to judicial review. Additionally, the APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review," including those actions that are other-

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[37] 5 U.S.C. § 551(2014).
[38] Motor Veh. Mfrs. Ass'n v. State Farm Ins. 463 U.S. 29, 31 (1983).
[39] *Id.*
[40] Center for Effective Government, Notice-and-Comment Rulemaking, http://www.foreffectivegov.org/node/3463 (last visited July 20, 2014).
[41] *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of David Goldston, Director of Government Affairs, Natural Resources Defense Council) ("Agencies often take several years to formulate a particular safeguard, reviewing hundreds of scientific studies, drawing on their own experts in science and economics, empaneling outside expert advisors, gathering thousands of public comments, and going though many levels of executive branch review"); Center for Effective Government, Notice-and-Comment Rulemaking, http://www.foreffectivegov.org/node/3463 (Last visited July 20, 2014).
[42] 5 U.S.C. § 553(b)(A) (2014) (excluding "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from section 553).
[43] Motor Veh. Mfrs. Ass'n v. State Farm Ins. 463 U.S. 29, 31 (1983).
[44] 5 U.S.C. § 706(2) (2014); Motor Veh. Mfrs. Ass'n v. State Farm Ins. 463 U.S. 29, 31 (1983).
[45] Shapiro, *supra* note 17, at 10.

wise unreviewable.[46] Courts may therefore vacate any rule, including a rescission of a rule,[47] as "arbitrary and capricious" under section 706 of the APA unless the agency carefully reviews each rule eliminated and is able to justify the rescission of a rule through an adequate basis in the rulemaking record.[48] The Supreme Court has construed this standard to require a reviewing court to conduct a "searching and careful" review of agency action.[49] This type of heightened review under the arbitrary or capricious standard has been referred to as the "hard look" doctrine. Under this doctrine, courts must carefully analyze both the administrative record and the agency's explanation to review whether it applied the "correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions."[50] The SCRUB Act lacks any clarification of the Commission's methodology for reviewing rules, as well as any limit on the criteria the Commission must follow for identifying rules that must be repealed so long as rescinding these rules would "eliminate or reduce unnecessarily burdensome costs to the United States economy" pursuant to section 101 of the bill. It is doubtful that this administrative blank-check would provide agencies with adequate empirical support to satisfy the hard-look doctrine's requirement of a thorough administrative record supporting a rule's recision,[51] making it unlikely that the SCRUB Act's process of regulatory cut-go would withstand judiciary scrutiny.

D. Regulatory Cut-Go Would Disproportionately Affect New Agencies, Inviting Controversy and Discouraging Government Efficiency

The SCRUB Act would create strong disincentives to streamline government agencies or respond to crises through the creation of new agencies. Regulatory cut-go applies to *any* agency that promulgates rules without exception, creating substantial uncertainty for a newly-created agency starting with a regulatory budget of $0.[52] If regulatory cut-go applies to the entire regulatory budget of an administration, then the initial regulation issued by new agency would have to displace an existing regulation from another agency. If, however, the bill's procedural hurdles only apply to the regulatory budget of each agency, it is unclear whether Congress would have to specifically exempt new agencies from regulatory cut-go, or if these agencies would borrow through other agencies' regulatory budgets. For instance, if regulatory cut-go existed prior to the creation of the Consumer Financial Protection Bureau (CFPB), an entirely new agency created in the wake of the financial crisis, either an agency separate from the CFPB would have to offset a new rule issued by the CFPB, or Congress would have needed to provide a

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[46] 5 U.S.C. §§ 702, 704. Any plaintiff that is "adversely affected or aggrieved" by a final agency action, including the recisision of a rule, may invoke judicial review. 5 U.S.C. § 702.; *see* Webster v. Doe, 486 U.S. 592 (1988); Oestereich v. Selective Service System, 393 U.S. 233 (1968).

[47] Motor Veh. Mfrs. Ass'n v. State Farm Ins. 463 U.S. 29, 31 (1983).

[48] 5 U.S.C. § 706(2) (2013); Motor Veh. Mfrs. Ass'n v. State Farm Ins. 463 U.S. 29, 31 (1983).

[49] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 407–09 (1971).

[50] Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process,* 41 DUKE L.J. 1385, 1410 (1992).

[51] Shapiro, *supra* note 17, at 10.

[52] *See id.* at 9.

special exemption for the CFPB due to the agency's inability to function without a regulatory budget.[53] Regardless of how new agencies would address these difficult, unnecessary, and controversial choices, the SCRUB Act would create barriers to reorganizing agencies to more effectively serve the public interest.[54]

II. THE SCRUB ACT WOULD UNDERMINE AGENCIES' ABILITY TO PROTECT PUBLIC HEALTH AND SAFETY

A. The Scrub Act Would Force Agencies to Make a Dangerous False Choice Between Existing Rules and New Rules to Protect the Public Health and Safety

Regulatory cut-go imposes a false choice between existing protection and a new threat to public health and safety. If an agency needed to respond to an imminent hazard to the public or environment, it would have to either rescind an existing rule that is haphazardly identified by the Commission's arbitrary process, or choose not to act. Regardless of its choice, the SCRUB Act would force agencies to choose the least-worst option, leaving people and the environment without safeguards against risks that agencies have identified and are designed to prevent.[55] For example, the implementation of the Dodd-Frank Wall Street Reform Act requires financial agencies to implement hundreds of critical regulations that are intended to prevent another financial meltdown. Under a regulatory cut-go system, financial agencies would be unable to meet congressional mandates and deadlines in putting forth these reforms without identifying hundreds of existing regulations, of equal economic significance, to be repealed, making the number of regulations that an agency must implement more important than the merits of those regulations.

Title II of the SCRUB Act also fails to provide any exception from cumbersome procedural hurdles for agencies to issue emergency rules that protect the public and environment from imminent harm. Agencies often promulgate emergency rules or orders in a timely response to immediate threats to public health and safety. Indeed, the APA specifically permits agencies to finalize rules not subject to the notice-and-comment process where the agency has good cause for genuine emergencies.[56] For instance, the U.S. Department of Transportation earlier this year issued an emergency order in response to the derailment of a railroad train in Quebec, Canada that killed 47 people,[57] with requirements for additional safety procedures to prevent railroad accidents involving the sudden release of flammable liquids.[58] Following a "string of fiery accidents" in North Dakota, Alabama, and Virginia, the Department of Transportation also issued an emergency order in May 2014, requiring railroads that carry more than one million gallons of fuel

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[53] *Id.*

[54] *See id.*

[55] *See id.* at 5 ("Regulatory pay-go completely ignores this less [of cost-benefit analysis], and thus is even more extreme than cost-benefit analysis in its disregard of regulatory benefits.").

[56] S. Comm. on the Judiciary, "Administrative Procedure Act: Legislative History," S. Doc. 248, 79th Cong. (1946) (requiring that agencies publish a "true and supported or supportable finding of necessity or emergency" when using the good cause exception).

[57] Matthew Brown, *U.S. Railroads Disclose Figures, Details on Volatile Oil Train Shipments,* CALGARY HERALD (June 25, 2014), http://www.calgaryherald.com/business/Railroads+disclose+figures+details+volatile+train+shipments/9970734/story.html [hereinafter Brown].

[58] 49 CFR 232.103(n) (2013).

to provide certain information to the Department.[59] The Department of Transportation thereafter issued another emergency order following the derailment of a train carrying crude oil in downtown Lynchburg, Virginia that spilled thousands of gallons of oil into the James River.[60] This oil later caught fire and disbursed throughout the James River, traveling in an oil slick that was 17 miles long toward Richmond and the Chesapeake Bay.[61] Following the train's derailment, officials stated that "2 to 5 trains carrying at least one million gallons of oil pass through 20 Virginia counties weekly."[62] Observing that railroad shipments of crude oil were causing an unsafe condition, the Department of Transportation found that a "pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d)," justifying the emergency order.[63] In each response to unsafe conditions, the Department of Transportation issued emergency orders to protect the public safety and environment. Prior to these orders, railroads were under no obligation to notify emergency responders when trains carrying millions of gallons of crude oil passed through their states.[64]

The SCRUB Act's cut-go procedures, however, would have prevented the Department of Transportation from issuing these orders without first identifying the cost of the order and then offsetting this cost by eliminating a rule identified by the Commission, which in turn would trigger the APA's rulemaking process for rescinding a rule. Although the APA's good cause exception does not require that agencies provide a notice-and-comment period for genuine emergencies,[65] the SCRUB Act fails to provide any such flexibility for agencies to bypass the cut-go procedures while issuing emergency rules to protect the public and environment from imminent harm, creating a serious risk to the safety of the public and environment.

Another example of the practical effects of regulatory cut-go can be found in the Federal Aviation Administration (FAA) decisions to prohibit flights into dangerous and unsafe areas. The FAA routinely updates its Temporary Flight Restriction list, which provides a "do-not-fly" list for areas affected by extreme weather or other unsafe conditions.[66] The FAA also issues emergency rules to routinely amend the Special Federal Aviation Regulation (SFAR), a list of flight paths that the FAA restricts due to dangerous conditions. For instance, the FAA issued a rule earlier this year under the good cause exception to the APA to prohibit American commer-

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[59] Brown, *supra* note 57.

[60] Curtis Tate, *Lynchburg, Va., Oil Train Derailment Illustrates Threat to Rivers,* McClatchyDC (May 2, 2014) http://www.mcclatchydc.com/2014/05/02/226425/lynchburg-va-oil-train-derailment.html.

[61] *Id.*

[62] Brown, *supra* note 57.

[63] Dept. of Transportation, *Petroleum Crude Oil Railroad Carriers,* DOT–OST–2014–0067, Petroleum Crude Oil Railroad Carriers (May 7, 2014), http://www.dot.gov/briefing-room/emergency-order.

[64] Jad Mouawad, *U.S. Issues Safety Alert for Oil Trains,* New York Times (May 7, 2014), http://www.nytimes.com/2014/05/08/business/us-orders-railroads-to-disclose-oil-shipments.html.

[65] Senate Committee on the Judiciary, "Administrative Procedure Act: Legislative History," Senate Document 248, 79th Congress, 2nd Session (1946) (requiring that agencies publish a "true and supported or supportable finding of necessity or emergency" when using the good cause exception).

[66] Federal Aviation Administration, Temporary Flight Restriction List, http://tfr.faa.gov/tfr2/list.html (last visited on July 21, 2014).

cial flights through Eastern Ukraine due to escalating conflicts in the region.[67] In promulgating this rule, the FAA specifically noted that, due to the escalating tension between Ukraine and the Russian Federation, there is a risk that "compliance with air traffic control instructions issued by the authorities of one country could result in a civil aircraft being misidentified as a threat and intercepted or otherwise engaged by air defense forces of the other country."[68] Following the crash of Malaysia Airlines Flight 17 as a result of this regional conflict, the FAA expanded the area of Eastern Ukraine where flights are prohibited.[69]

Nevertheless, had the SCRUB Act applied to this rulemaking, the FAA would first have to determine its cost to the U.S. economy, and then eliminate a rule identified by the Commission that was "unnecessarily burdensome," a process could take months or years, depending on the complexity of the underlying rule that the Commission identifies for repeal. Thus, even though Congress appreciates the value of agency efficiency and speed when responding to public emergencies by establishing a good-cause exception to the APA's comment and notice requirements for new rules, the SCRUB Act would effectively eviscerate this exception, impairing the ability of any agency to respond to any threat to public health, safety, and the environment, no matter how dangerous or imminent.

To address the host of concerns raised by regulatory cut-go, Rep. Hank Johnson (D-GA) offered an amendment to strike these portions of H.R. 4874 by eliminating Title II of the bill.[70] Noting that regulatory cut-go would have far-reaching consequences for every new agency rule, he stated that the SCRUB Act "would apply to a new rule to prevent the further loss of life as a result of ignition switch failures in cars we drive," and "prevent an agency from issuing an emergency regulation to prevent chemical contamination of the water we drink."[71] Speaking in support of the amendment, Ranking Member John Conyers (D-MI) cited the bill's "many other shortcomings," including "a litany of undefined terms" that would require a review of "all current rules, regardless of whether they impose little or no cost."[72] This amendment failed along party lines by a vote of 9 to 16.[73]

B. Regulatory Cut-Go Would Create an Additional Layer of Bureaucracy and Siphon Billions from Regulatory Agencies

Ironically, the SCRUB Act's solution to the claims of "too much bureaucracy" is to mandate additional layers of bureaucracy. Title I of the bill would establish a new agency to be funded by potentially billions of taxpayer dollars. Although Title I is not within the

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[67] FEDERAL AVIATION ADMINISTRATION, Prohibition Against Certain Flights in the Simferopol (UKFV) Flight Information Region (FIR), 79 FR 22862, (Apr. 25, 2014), https://www.federalregister.gov/articles/2014/04/25/2014-09545/prohibition-against-certain-flights-in-the-simferopol-ukfv-flight-information-region-fir.

[68] *Id.*; Zeke Miller, *U.S. Warned Of Unsafe Airspace Over Crimea, But Not Where MH17 Crashed,* TIME (July 17, 2014), http://time.com/3001874/ukraine-crash-faa-crimea-airspace.

[69] Mark Berman, *FAA Bans U.S. flights over Eastern Ukraine,* WASH. POST (July 17, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/07/17/faa-bans-u-s-flights-over-eastern-ukraine/.

[70] Tr. of Markup of H.R. 4874, "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014 by the H. Comm. on the Judiciary, 113th Cong. at 87 (June 19, 2014), http://judiciary.house.gov/_cache/files/f7dc303b-9bc1-47a8-a7c7-a8abcc89efef/06.18.14-markup-transcript.pdf [hereinafter Markup Tr.]

[71] *Id.*

[72] *Id.* at 92.

[73] *Id.* at 102.

jurisdiction of our Committee, an explanation of this provision is necessary for an understanding of the bill's impact on agency missions to protect the public health and safety.

To fund this Commission, the SCRUB Act allocates the greater of 1% of all unobligated funds of regulatory agencies or $25 million. Without a definition of "regulatory agencies," the bill appears to apply to any agency capable of issuing guidance on any agency rule. If this definition only includes Cabinet-level agencies, the Commission's budget would be at least $4.3 billion.[74] Alternatively, if the definition includes all of the Executive agencies that have the authority to make rules to fulfill their statutory obligations, the Commission's budget would exceed $5.3 billion.[75]

Recognizing the excessive waste caused by siphoning billions from other agencies' funds, Rep. Hank Johnson (D-GA) noted that the "effects of the bill would be a new sequester on regulatory agencies."[76] As Rep. Johnson observed, "The Department of Veterans Affairs, for example, could lose $54 million from its budget at a time when it clearly needs robust funding," concluding that this section of the bill alone "demonstrates the incomprehensible nature of this legislation."[77]

To address the concern that the Commission's budget would indiscriminately divert funds from the essential funds of agencies, Rep. Jerrold Nadler (D-NY) offered an amendment to Title I of the SCRUB Act that would have limited the Commission's operating budget to $25 million.[78] In comparison, he explained that other commissions, such as the National Bankruptcy Review Commission, were allocated considerably less.[79] The SCRUB Act Commission's budget would likewise dwarf the budget of the 9/11 Commission, which set a record for employing the most staff of any congressional commission, at one time having more than eighty researchers, and receiving a total budget of $12,000,000.[80]

Because this amendment would apply to Title I of the bill, which is not within the Committee's jurisdiction, a point of order raised by Rep. Jason Smith (R-MO) stating that the amendment was not germane was sustained. Thus the amendment was not considered.

III. THE SCRUB ACT IS A SOLUTION IN SEARCH OF A PROBLEM

A. The SCRUB ACT is Yet Another Anti-Regulatory Bill Based on False Assumptions

The SCRUB Act's regulatory cut-go process is premised on the misguided belief that the public cannot benefit from new public protections and safeguards unless old ones are repealed. This "one in, one out" system overlooks the fact that Congress already has the power to repeal any regulation. However appealing this concept may be in theory, the practical impact of this legislation would be

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[74] THE WHITE HOUSE, Balances of Budget Authority: Budget of the U.S. Government, Federal Fund Unobligated Balance Carried Forward, By Agency—FY 2013 Budget, 15, http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/balances.pdf.

[75] *Id.*

[76] Markup Tr., *supra* note 70, at 84.

[77] *Id.*

[78] *Id.* at 78.

[79] *Id.* at 85.

[80] Matthew E. Glassman & Jacob R. Straus, *Congressional Commissions: Overview, Structure, and Legislative Considerations,* CONGRESSIONAL RESEARCH SERVICE 18 (May 14, 2014), http://www.crs.gov/pdfloader/R40076.

nothing short of disastrous, as Professor Ronald Levin argued in his testimony on the bill:

> [E]ven if the Title II process were justified in principle, the unwieldiness of the process would counsel against adopting it. The challenges an agency would face in implementing it would be daunting. The process would require the agency to quantify the costs of every new rule, no matter how trivial the rule might be. This is a substantial departure from current practice. . . . The SCRUB Act . . . goes much further by requiring the same procedure for *every* rule, not just every major rule. I have to assume that the subcommittee did not give sufficient thought to this manifestly extravagant requirement. Could the sponsors really mean to require an agency to prepare a plan for decennial review of rules that would have such minor impact that they would even be exempted from notice and comment requirements? Rules that would have no compliance costs at all, because they are instituted to distribute benefits rather than to impose burdens? Rules that are designed to address a short-term situation, so that they will not even exist 10 years after they are promulgated? Rules of particular applicability, such as decisions approving corporate reorganizations? Section 301 is stunningly overbroad, but I am not going to recommend that it be trimmed back to encompass major rules, because even with that limitation it should be eliminated from the bill.[81]

Proponents of so-called regulatory "reform" measures like the SCRUB Act claim that regulation imposes such costs on businesses that it stifles economic growth and job creation. In support of this contention, they repeatedly cite a widely-debunked study by economists Mark and Nicole Crain that claims Federal regulation imposes an annual cost of $1.75 trillion on business.[82] The Crain study, however, has been extensively criticized for exaggerating the costs of Federal rulemaking on small businesses. For example, the Center for Progressive Reform (CPR) notes that the $1.75 trillion cumulative burden cited by the study fails to account for any benefits of regulation.[83] CPR observed that OMB estimated in 2008 that major rules imposed $46 billion to $54 billion in costs, but also produced $122 billion to $656 billion in benefits.[84] Moreover, the study's methodology is flawed with respect to how it calculated economic costs. The study, which relied on international public opinion polling by the World Bank on how friendly a particular country was to business interests, ignored actual data on costs imposed by Federal regulation in the United States.[85]

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[81] *Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2014: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. 9, 11 (2014) (statement of Ronald M. Levin, Professor of Law, Washington University School of Law), http://judiciary.house.gov/ cache/files/61953df7-cc3f-486a-bb27-71a8d2be42c0/levin-scrub-act-testimony.pdf [hereinafter SCRUB Hearing].

[82] Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms, Rep. No. SBAHQ–08–M–0466 (Sept. 2010), http://archive.sba.gov/advo/research/rs371tot.pdf.

[83] Sidney Shapiro, *et al.,* Setting the Record Straight: The Crain and Crain Report on Regulatory Costs, Center for Progressive Reform White Paper #1103 (Feb. 2011).

[84] *Id.*

[85] *Id.*

The Congressional Research Service (CRS) also conducted an extensive examination of the Crain study and criticized much of its methodology.[86] CRS noted that the authors of the Crain study themselves told CRS that their study was "not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)"[87] CRS concluded that "a valid, reasoned policy decision can only be made after considering information on both costs and benefits" of regulation.[88]

Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush administrations, has also refuted the claim that regulations undermine the economy or job growth, explaining that "[n]o hard evidence is offered for this claim; it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber."[89] At a legislative hearing held by the Subcommittee on a prior anti-regulatory bill, the Majority's own witness debunked the myth that regulations stymie job creation. Christopher DeMuth stated on behalf of the American Enterprise Institute, a conservative think tank, that the "focus on jobs . . . can lead to confusion in regulatory debates" and that "the employment effects of regulation, while important, are indeterminate."[90] A recently released study confirms this result.[91]

If anything, regulations can *promote* job growth and put Americans back to work. For instance, the BlueGreen Alliance has noted that studies of the direct impact of regulations have concluded that "most regulations result in modest job growth or have no effect, and economic growth has consistently surged forward in concert with these health and safety protections."[92] The OMB observed that 40 years of success of the Clean Air Act "have demonstrated that strong environmental protections and strong economic growth

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[86] CURTIS W. COPELAND, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, R41763 (Apr. 6, 2011).

[87] *Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

[88] *Id.* The Economic Policy Institute also issued a critique of the Crain study outlining additional concerns with the study's methodology and data. *See* John Irons and Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited $1.75 Trillion Cost of Regulations Is Not Worth Repeating, Economic Policy Institute, July 19, 2011, available at http://w3.epi-data.org/temp2011/IssueBrief308.pdf.

[89] Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs,* N.Y. TIMES ECONOMIX, Oct. 4, 2011, http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment.

[90] *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary,* 112th Cong. 64–65 (2011) (prepared statement of Christopher DeMuth, American Enterprise Institute); *see, e.g.,* Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Minimal,* WASH. POST, Nov. 13, 2011, http://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gIQALRF5IN_story.html?hpid=z1 ("In 2010, 0.3 percent of the people who lost their jobs in layoffs were let go because of 'government regulations/intervention.' By comparison, 25 percent were laid off because of a drop in business demand. . . . Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job creation.").

[91] *See* Tara M. Sinclair & Kathryn Vesey, *Regulation, Jobs, and Economic Growth: An Empirical Analysis* 27, (THE GEORGE WASHINGTON UNIVERSITY REGULATORY STUDIES CENTER, Working Paper), at 27(finding that the "macroeconomic effects of regulation are uncertain" and that the study's "results reveal no impact" when considering either the impact of regulations on the "total economy or strictly the private sector"), *available at* http://regulatorystudies.columbian.gwu.edu/files/downloads/032212_sinclair_vesey_reg_jobs_growth.pdf

[92] Letter to Rep. Lamar Smith (R-TX), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary, from David A. Forster, Executive Director, BlueGreen Alliance, at 2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

go hand in hand."[93] Similarly, the Natural Resources Defense Council, the United Auto Workers, and the National Wildlife Federation jointly issued a report finding that vehicle emissions standards and clean vehicle research, development and production are already responsible for 155,000 jobs at 504 facilities in 43 states and the District of Columbia.[94] According to the same report, 119,000 jobs were created in this industry between 2009 and 2011 alone.[95]

Similarly, it was estimated in 2012 that a pending rule under the Clean Air Act requiring power plants to reduce mercury and other toxic emissions by 90 percent in the next 5 years would create 45,000 temporary construction jobs over the next 5 years and possibly 8,000 permanent jobs because of the upgrades required by the new rule.[96] This job growth would be in addition to the rule's expected benefit of preventing 11,000 deaths from heart attacks and respiratory diseases like asthma.[97]

Additionally, a report by Northeast States for Coordinated Air Use Management (NESCAUM) demonstrates a direct correlation between environmental regulations and job growth in the Northeast. It found that by enacting stricter fuel economy standards and pursuing cleaner forms of energy, more jobs would be created.[98] Specifically, NESCAUM found that stricter fuel economy standards and regulations governing cleaner forms of energy would increase employment from 9,490 to 50,700 jobs; increase gross regional product, a measure of the states' economic output, by $2.1 billion to $4.9 billion; and increase household disposable income increases by $1 billion to $3.3 billion.[99]

Anti-regulatory proponents also rely on an equally flawed corollary argument that regulatory uncertainty creates a disincentive for businesses to hire additional employees. Bruce Bartlett, the senior economic official from the Reagan and Bush administrations, observes that "regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out."[100] Likewise, Professor Sidney Shapiro testified before the Subcommittee in the 112th Congress that "[a]ll of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment."[101] In fact, a July 2011 *Wall Street Journal* survey of business economists found that the

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[93] Executive Office of the President—Office of Management and Budget, Statement of Administration Policy on H.R. 2401, Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011 (Sept. 21, 2011).

[94] Natural Resources Defense Council et al., Supplying Ingenuity: U.S. Suppliers of Clean, Fuel-Efficient Vehicle Technologies (2011), *available at* http://www.nrdc.org/transportation/autosuppliers/files/SupplierMappingReport.pdf.

[95] *Id.*

[96] Editorial, *The Job-Creating Mercury Rule,* N.Y. TIMES, Feb. 22, 2012, http://www.nytimes.com/2012/02/23/opinion/the-job-creating-mercury-rule.html.

[97] *Id.*

[98] NORTHEAST STATES FOR COORDINATED AIR USE MANAGEMENT (NESCAUM), ECONOMIC ANALYSIS OF A PROGRAM TO PROMOTE CLEAN TRANSPORTATION FUELS IN THE NORTHEAST/MID-ATLANTIC REGION (2011) (on file with Natural Resources Defense Council) http://switchboard.nrdc.org/blogs/ngreene/CFS%20Economic%20Analysis%20Report%20INTERNAL.PDF.

[99] *Id.*

[100] Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs,* N.Y. TIMES Economix Blog, Oct. 4, 2011, http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/?s.p.=4&sq=Bartlett&st=case.

[101] *Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary,* 112th Cong. 1 (2011) (statement of Prof. Sidney Shapiro, Wake Forest School of Law) http://judiciary.house.gov/_files/hearings/pdf/Shapiro%2010252011.pdf

"main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies." [102] Not surprisingly, a September 2011 National Federation of Independent Business survey of its members found that "poor sales"—not regulation—is the biggest problem.[103] Indeed, the Main Street Alliance, a small business organization, has noted that "[i]n survey after survey and interview after interview, Main Street small business owners confirm that what we really need is more customers—more demand—not deregulation." [104]

B. The SCRUB Act's Solution to "Over-Regulation" is an Unbalanced and Redundant Review That Agencies Already Conduct

Even if one were to accept the false premise that regulations impede job growth and harm the economy, the SCRUB Act represents a redundant and arbitrary solution to any such problem. Agencies regularly conduct retrospective reviews.[105] In fact, retrospective review has been a top priority under the Obama administration,[106] and Congress has long prescribed that agencies review regulations to determine whether any should be revoked or modified.

1. Congress Already Has Tools for Enforcing Retrospective Review

Congress already has numerous tools for influencing Federal rules. In addition to its numerous tools for exercising oversight, Congress may shape agency missions through the appropriations process, or narrowing agency authority through statute.[107] Congress may also disapprove any rule proposed by an agency through the Congressional Review Act,[108] or pass legislation to stay the effect of an existing rule. For instance, the House attempted to do this in the in the 112th Congress, passing legislation in response to the Environmental Protection Agency's cement manufacturing standards.[109]

Congress has already enacted several legislative mandates that require retrospective review.[110] Section 610 of the Regulatory Flexibility Act (RFA) requires periodic evaluation of existing regulations that affect small business entities.[111] The RFA also tasks agencies with demonstrating the continued need for rules, whether the agency has received complaints from the public concerning the rule, the complexity of the rule, and the extent to which the rule

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[102] Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring,* WALL ST. J., July 18, 2011, *available at* http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html.

[103] Press Release, Nat'l Federation of Independent Businesses, Small Business Confidence Takes Huge Hit: Optimism Index Now in Decline for Six Months Running (Sept. 13, 2011) ("Of those reporting negative sales trends, 45 percent blamed faltering sales, 5 percent higher labor costs, 15 percent higher materials costs, 3 percent insurance costs, 8 percent lower selling prices and 10 percent higher taxes and regulatory costs."), *available at* http://www.nfib.com/press-media/press-media-item?cmsid=58190.

[104] Letter to Rep. Lamar Smith (R-TX), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Committee on the Judiciary, from Jim Houser, Co-Chair, The Main Street Alliance, *et al.,* at 1–2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[105] SCRUB Hearing, *supra* note 81, at 2 (statement of Ronald M. Levin, Professor of Law, Washington University School of Law).

[106] Cheryl Bolen, Shelanski *Considering Changes in Agency Rulemaking Processes in Year Ahead,* BLOOMBERG BNA DAILY REPORT FOR EXECUTIVES, at 1 (Jan. 16, 2014).

[107] *See, e.g.,* CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS, RL 34354 (2008).

[108] 5 U.S.C. § 801(b) (2013).

[109] Cement Sector Regulatory Relief Act of 2011, H.R. 2681, 112th Cong. (2011).

[110] SCRUB Hearing, *supra* note 81 (statement of Ronald M. Levin, Professor of Law, Washington University School of Law).

[111] Pub. L. No. 96–354, 94 Stat. 1164, 1169 (1980).

is duplicative or overlaps with other Federal rules, or State and local government rules.[112] In 1996, the Economic Growth and Regulatory Paperwork Reduction Act was enacted,[113] requiring requires certain financial agencies, such as the Federal Deposit Insurance Corporation, to conduct a review of their regulations every 10 years.[114] Other reviews are conducted at the discretion of the agency.[115]

2. The Administration Has Issued Several Executive Orders Requiring Retrospective Review that Have Already Led to Hundreds of Rules Proposed for Elimination

Retrospective review is also a top priority for the Obama administration.[116] Since 2011, President Obama has issued a series of Executive Orders to have agencies conduct meaningful retrospective reviews.[117] In January 2011, President Obama issued Executive Order 13563 directing agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[118] The Executive Order further directs each agency to: "develop and submit to [OIRA] a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives." Soon thereafter, President Obama issued Executive Order 13579 in July 2011 encouraging independent regulatory agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[119] These analyses, together with supporting data and evaluations, should be released online whenever possible, according to the Executive Order. In addition, the Executive Order asked each independent regulatory agency to "develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or

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[112] 5 U.S.C. § 610 (2014).

[113] Pub. L. No. 104–208, § 2222, 110 Stat. 3009 (1996), codified at 12 U.S.C. § 3311 (2014). Other agencies subject to this statutory mandate are the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau.

[114] *Id.*

[115] GAO REPORT, *supra* note 13, at 5.

[116] Cheryl Bolen, Shelanski *Considering Changes in Agency Rulemaking Processes in Year Ahead,* BLOOMBERG BNA DAILY REPORT FOR EXECUTIVES, at 1 (Jan. 16, 2014).

[117] SCRUB Hearing, *supra* note 81, at 2 (statement of Ronald M. Levin, Professor of Law, Washington University School of Law).

[118] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[119] Exec. Order No. 13,579, 76 Fed. Reg. 41587 (July 14, 2011). Independent regulatory agencies are "independent" in the sense that they are independent of the President. The President has limited authority to remove their leaders (usually, heads of such agencies can only be removed for cause, rather than at the President's pleasure). STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 100 (4th ed., Aspen Publishers, Inc. 1999). Such agencies are usually styled "commissions" or "boards" (e.g., the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board).

less burdensome in achieving the regulatory objectives."[120] Such plans were required to be filed within 120 days from the date of the Executive Order.

In May 2012, President Obama issued yet another Executive Order requiring agencies to "conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies."[121] In particular, this Executive Order directed agencies to "invite, on a regular basis . . . public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations."[122] The Executive Order required agencies to "give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment."[123] In addition, the Executive Order directed agencies to "give special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses.[124]

According to Cass Sunstein, who served as OIRA Administrator from 2009 to 2012, these Orders cumulatively "energized" agencies to identify nearly 600 outdated rules for elimination.[125] Agencies have already finalized or formally proposed over a hundred of these reforms.[126] For instance, the Department of Health and Human Services (HHS) has finalized several rules to remove hospital and healthcare reporting requirements, saving $5 billion over 5 years.[127] Additionally, as Howard Shelanski, the current OIRA Administrator, recently noted, OIRA plans to establish "more concrete ways to deepen and strengthen retrospective review."[128] Combined, these good-government initiatives have already resulted in hundreds of formal proposals to eliminate rules, representing billions of dollars in savings over the next several years,[129] and substantially more in eventual savings.[130]

3. The SCRUB Act's Meat-Cleaver Approach to Rulemaking Would Create Immense Bureaucratic Hurdles without Addressing the Critical Barriers to Effective Retrospective Review

The existing processes for retrospective review are a smart, scalpel-like approach to regulatory revisions. The overwhelming con-

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[120] *Id.*
[121] Exec. Order. 13610, 77 Fed. Reg. 28467 (May 14, 2012).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Cass R. Sunstein, *The Regulatory Lookback,* forthcoming in B.U. L. REV. (preliminary draft available at http://ssrn.com/abstract=2360277) (draft at 13).
[126] *See* Cary Coglianese, Moving Forward with Regulatory Lookback, 30 YALE J. ON REG. 57, 58 (2013).
[127] DEP'T OF HEALTH & HUM. SERVS., PLAN FOR RETROSPECTIVE REVIEW OF EXISTING RULES 3, 8–17 (2011), http://www.whitehouse.gov/sites/default/files/other/2011-regulatoryaction-plans/healthandhumanservicesregulatoryreformplanaugust2011.pdf.
[128] Cheryl Bolen, Shelanski *Considering Changes in Agency Rulemaking Processes in Year Ahead,* BLOOMBERG BNA DAILY REPORT FOR EXECUTIVES, at 1 (Jan. 16, 2014).
[129] COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRES., SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 6 (2012), *http://www.whitehouse.gov/sites/default/files/lookback*_report_rev_final.pdf.
[130] Cass R. Sunstein, *The Regulatory Lookback,* forthcoming in B.U. L. REV. (preliminary draft available at http://ssrn.com/abstract=2360277) (draft at 16).

sensus of administrative law experts support a balanced and affordable approach to retrospective review that allows for agency flexibility and selectivity to target rules for elimination. In contrast, not even the conservative proponents of regulatory cut-go support a meat-cleaver approach to every regulation, which will only increase bureaucratic red tape and uncertainty.

There is broad consensus from the nonpartisan Administrative Conference of the United States (ACUS) that any retrospective review should be selective, flexible, and even-handed. These goals reflect the assessments and expertise of a broad group of practitioners, agency personnel, and academics in the administrative law field. In its recommendations on retrospective review, ACUS noted that any review should give agencies "maximum flexibility to design processes that are sensitive to individual agency situations and types of regulations."[131] Given differences among agencies, ACUS stated that such processes should be "tailored to meet agencies' individual needs" and that the President as well as Congress "should avoid mandating standardized or detailed requirements."[132] ACUS also recommended that the review should focus on the most important regulations with sufficient time and resources to ensure a meaningful review.[133]

The GAO has likewise reported that the "most critical barrier" to effective retrospective review is agencies' "difficulty in devoting the time and staff resources required for reviews while also carrying out other mission activities."[134] Much like ACUS' recommendation that retrospective review be selective and flexible, GAO found that "it is not necessary or even desirable for agencies to expend their time and resources reviewing all of their regulations."[135] Rather, agencies should "conduct substantive reviews of a small number of regulations that agencies and the public identify as needing attention."[136]

Unlike the retrospective review advocated by ACUS and the GAO, the SCRUB Act's mandate of an unlimited and unbalanced review of all regulations would create immense bureaucratic hurdles to effective retrospective review. By requiring agencies to assess the cost of every new rule, the SCRUB Act would drown agencies in red tape. Furthermore, even the conservative proponents of regulatory cut-go acknowledge that legislation like the SCRUB Act is "uncharted policy territory" with major shortcomings.[137] Noting that potential perils of regulatory cut-go, the conservative Competitive Enterprise Institute (CEI) recommended that Congress should proceed in a step-by-step experiment through pilot programs to test the feasibility of regulatory cut-go.[138] CEI also noted that the result of this process could be to "make regulation less accountable."[139] Acknowledging that legislation like SCRUB Act could spawn substantial paperwork burdens and fines, CEI observed that

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[131] ADMINISTRATIVE CONFERENCE OF THE U.S., *Review of Existing Agency Regulations, Recommendation* 95–3 (adopted June 15, 1995).
[132] *Id.*
[133] *Id.* at 1–2.
[134] GAO REPORT, *supra* note 13, at 7.
[135] *Id.*
[136] *Id.*
[137] Marlo Lewis, Reviving Regulatory Reform: Options for the President and Congress, Competitive Enterprise Institute (Dec. 2004) 84, http://cei.org/pdf/4446.pdf.
[138] *Id.* at 3, 84.
[139] *Id.* at 75.

Congress may even need to create a separate regulatory audit agency, similar to the Internal Revenue Service (IRS), to "promulgate rules to standardize accounting procedures and reporting requirements" for costs to agencies.[140]

H.R. 4874 SECTION-BY-SECTION EXPLANATION

A description of the bill's principal substantive provisions follows.

Title II—Regulatory Cut-Go

Sec. 201. Cut-Go Procedures. Section 201(a) requires an agency, before it promulgates a new rule, to repeal rules that the Commission has classified to be repealed so that the annual costs of the new rule to the U.S. economy is offset by the repeal of the current rule. An agency may also preemptively repeal such rules identified by the Commission, or offset the costs of a new rule by repealing a rule listed in the Commission's report, but must achieve a net reduction in costs imposed by the agency's rules. This may require repealing additional rules of the agency listed in the Commission report.

Sec. 202. Applicability. Once the agency has repealed all the rules identified by the Commission, then it no longer needs to go through the offset process.

Sec. 203. OIRA Certification of Cost-Benefit Calculations. The OIRA Administrator must review and certify the accuracy of agency determinations of the costs of new rules issued under section 201. Such certification must be included in the administrative record of the relevant rulemaking by the agency promulgating the rule and submitted to Congress.

Title III—Retrospective Review of New Rules

Sec. 301. Plan for Future Review. Section 301 requires the agency, when promulgating a final rule, to include a plan providing for the review of such rule not later than 10 years after the date on when such rule is promulgated. The review must be substantially similar to the review required under section 101(h) of the bill. For non-major rules, the agency's plan must include procedures and standards to enable the agency to determine whether to eliminate unnecessary regulatory costs to the economy. When feasible, the agency must include a proposed plan for review of a proposed rule in its notice of proposed rulemaking and receive public comment on the plan.

Title IV—Judicial Review

Sec. 401. Judicial Review. Section 401 makes agency compliance for immediate repeals and cut-go repeals are subject to judicial review under chapter 7 of title 5 of the U.S. Code.

Title V—Miscellaneous Provisions

Sec. 501. Definitions. Section 501 sets forth various definitions. For example, it defines "agency" to include independent agencies.

[140] *Id.* at 82.

With respect to major rules, it employs a similar, but different definition for that term as used in the Congressional Review Act.[141]

Sec. 502. Effective Date. Section 502 sets forth the effective date as the date of enactment.

CONCLUSION

The bill relies on the false premise that regulations undermine economic growth because of their attendant bureaucratic red tape. Yet, ironically, H.R. 4874 would drown agencies in additional layers of red-tape by making it nearly impossible to establish any new rule, no matter how pressing, or issue any guidance on existing rules. By requiring every agency to assess the costs of new rules or informal guidance and tasking the Office of Information and Regulatory Affairs (OIRA) with certifying each of these assessments, the SCRUB Act would waste untold resources and water-down existing oversight of Federal rulemaking. The SCRUB Act would force agencies to make dangerous false choices between using existing rules to protect the public health, or enduring years of delays and regulatory burdens through the bill's unworkable cut-go mandate to respond to emerging threats or develop better rules to address existing threats.

Rather than streamline rulemaking or eliminate unnecessary rules through a thoughtful retrospective review process, this bill would result in years of delays and substantial regulatory uncertainty by requiring a new rulemaking process for any rule eliminated. Moreover, even conservative supporters of regulatory cut-go acknowledge that it would generate substantial regulatory costs in itself, perhaps even requiring an equivalent of the Internet Revenue Service to audit for compliance. In the process, H.R. 4874 would divert billions of dollars from agency budgets, undermining agencies' missions and wasting taxpayer dollars on a redundant and inefficient accounting experiment. This review would likely be the most costly in U.S. history without any evidence that it would create a single job beyond the Commission itself. Put simply, the bill prioritizes corporate profits over the health and safety of Americans.

For the foregoing reasons, we strongly oppose H.R. 4874 and we urge our colleagues to join us in opposition.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
JUDY CHU.

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[141] For example, section 804 of the Congressional Review Act defines a major rule as:

any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

(A) an annual effect on the economy of $100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

LUIS V. GUTIERREZ.
KAREN BASS.
CEDRIC RICHMOND.
HAKEEM JEFFRIES.

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